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Office Supreme Court, U. S.
FILED
JUL 5 1952
CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1951

No. 180

JOSEPH PIGNATARO,

Petitioner,

against

WATERMAN STEAMSHIP CORPORATION,

Respondent.

and

RYAN STEVEDORING CO., INC.,

Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

PHILIP F. DI COSTANZA,
Proctor for Petitioner.

JACOB RASSNER,
on Petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

NOTE: No appeal was taken insofar as respondent-impleaded is concerned.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 27, 1951.

Questions Presented

1. Is review by the Supreme Court of the United States available to correct a decision that a Court of Appeals predicated on alleged evidence, which it assumed from

argument of counsel had been presented at the trial, but which in fact was non-existent?

2. Whether our Admiralty Courts are no longer concerned with the true administration of justice, based on evidence, and have become a mere locale of chance where decrees are dictated by the trial court's personal pleasure. In other words, is a decree of a trial court unassailable on appeal, irrespective of the following:

a. The absence of any finding of fact as to the cause or manner of the happening of the accident.

b. That the testimony of the six witnesses to the accident called by the petitioner was corroborated and conceded as true by the two witnesses called on behalf of respondent.

c. That the trial court disregarded the basic and fundamental rules of evidence.

d. That there is no support in the record for various statements in the opinion.

e. That the trial court based the opinion solely on his expressed personal displeasure toward the attitude of each and all of the eight witnesses called by both parties, as indicating an interest in the success of the petitioner's cause.

Opinion Below

Per Curiam; on the night of 12/18/47, Joseph Pignataro, a longshoreman employed by Ryan Stevedoring Co. Inc., hereinafter called Ryan, was working on the main deck of the S.S. ALBERT K. SMILEY, owned by the Waterman Steamship Corp., hereinafter called Waterman, Pignataro was standing on a hatchboard cover over the No. 1 hatch opening guiding a cable that was brought up from the 'tween deck. While there engaged he fell to the floor of the lower

hold, a distance of about thirty feet; and sustained serious injuries for which he filed the instant libel against Waterman, which corporation interpleaded Pignataro's employer Ryan, since the latter was in charge of the loading operations on board ship. Libelant's account of the accident was that his fall was caused when the hatchboard cover on which he was standing broke beneath him because the boards were rotten. His witnesses tended to support this version and, indeed, two of the respondent's witnesses also supported it although their testimony was in conflict with written statement they had made prior to the trial. The respondent did not offer any particular explanation as to how the accident happened but did produce witnesses in the persons of Radigan and Petrosino, who testified in substance that the hatchboard covers were in good condition before the accident occurred. There was conflicting testimony and the trial judge refused to believe the libelant's witnesses indicating in his opinion that their demeanor while testifying gave rise to serious doubts as to their credibility. He concluded that the libelant had not sustained his burden of proving that the cover was defective, which fact was the sine qua non of the respondent's liability on the theory that the ship was unseaworthy which libelant advanced on the trial. It is almost superfluous to state that on this record the trial courts' findings are not clearly erroneous, and the decree, therefore, is AFFIRMED.

Jurisdiction

The judgment of the Court of Appeals was entered on February 27, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statement

Petitioner was a longshoreman on December 18, 1947, in the employ of Ryan Stevedoring Co. Inc., respondent impleaded, doing longshore work aboard the S.S. ALBERT K. SMILEY, respondent's vessel (6, 35, 36). He had been assigned with eleven other men and a foreman to the number one hatch where he had worked since the day before the accident (36).

The hatch was composed of five beams on each deck, on which there were six sections of hatchboards, nine boards to each section, which hatchboards were about 2½ feet wide (37).

Just before the accident three sections were in place on the main deck, from which one hatchboard had been removed in the middle row to leave room for the fall, (43, 44, 55). After the accident the hatchboard next to this removed board was missing (60).

The accident occurred on December 18, 1947 at about 7:30 P. M. (42). Just prior to the accident the men had finished putting beams in the 'tween deck and they were about to cover them with hatchcovers (41, 44, 45, 54). The fall was not in motion and the winch was stopped (42, 44, 45, 54, 59, 64, 66).

Petitioner had just relieved the hatch foreman for the purpose of guiding the fall, then stationary, when the hatchboard on which he was standing broke, and petitioner was precipitated thirty feet into the lower hold (49, 54, 66, 81), resulting in petitioner suffering injuries which necessitated the removal of about one quarter of his skull which was replaced by metal and other serious injury and permanent disability.

Numbers refer to pages in appendix to Appellant's Brief in the Court below.

Reasons for Granting the Writ

It is of the utmost importance to all litigants that the Court sitting in Admiralty should make a finding of fact as to the circumstances under which the accident took place.

It is impossible for an Appellate Court to justly apply the law when in total ignorance of the manner of the happening of an accident, whether the accident happened as petitioner contended or whether the accident happened in one of the two ways suggested by the respondent. Had the trial court stated the manner in which the accident occurred, irrespective of whether it was in the manner contended by petitioner or one of the two contended by the respondent, such finding might very well have been the basis for a decree in favor of petitioner under the law.

The true administration of justice cannot be attained when an Appellate Court erroneously holds that an issue of fact was presented by assuming that two witnesses gave contradictory evidence, when such evidence was non-existent.

Such manifest error indicates that the Appellate Court obviously assumed that such testimony was actually given at the trial, and failed to check the record, a reading of which would have disclosed that such testimony was never presented. Neither Radigan nor Petrosino testified, as the Appellate Court found, as to any inspection of the hatchboard in question before the accident occurred.

Errors Complained of

1. That the trial court made no finding of fact as to the cause or manner of the happening of the accident.

2. That the expressed personal displeasure of the trial court toward the attitude of each and all of the witnesses to the accident constituted the basis of the Court's decision,

in total disregard of the uncontradicted and conceded evidence.

3. That the Court below based its affirmance of the trial court's decree on a finding that there was conflicting evidence by reason of the fact that one Radigan, and one Petrosino, had testified "in substance that the hatchboard covers were in good condition before the accident occurred."

THERE WAS NO SUCH TESTIMONY.

JOSEPH PIGNATARO,
Petitioner,

By PHILIP DI COSTANZA,
Proctor for Petitioner.

Argument

The Court of Appeals for the Second Circuit held as follows:

> "Libelant's account of the accident was that his fall was caused when the hatchboard cover on which he was standing broke beneath him because the boards were rotten. His witnesses tended to support this version and, indeed, two of the respondent's witnesses also supported it * * *."

The Court continued:

> "* * * although their testimony was in conflict with written statements they had made prior to the trial."

If in fact (which is denied) such written statements by respondent's witnesses were in conflict with their testimony at the trial, such conflicting testimony can hardly be urged as the basis for a decree in respondent's favor, but only as attacking the credibility of respondent's witnesses and not of the six petitioner's witnesses.

The Court below found that the trial court had made no finding of fact as to how the accident occurred, stating as follows:

> "The respondent did not offer any particular explanation as to how the accident happened * * *."

The Court continued:

> "* * * but did produce witnesses in the persons of Radigan and Petrosino, who testified in substance that the hatchboard covers were in good condition before the accident occurred."

(The following references are to the appendix of appellee's brief.)

The Court below stated that both Radigan and Petrosino saw the hatchboard before the accident occurred. The Court below was in error.

Radigan testified that before the accident, the hatch boards were covered with tarpaulin and folded over (fols. 105-106). He further testified he made no inspection after the accident (fol. 68).

Petrosino testified he arrived at the scene of the accident forty minutes after its occurrence (fol. 139) and that he made no inspection (fols. 141, 142, 149, 150).

The situation presents itself as follows:

Six eye witnesses called on behalf of petitioner testified that the accident occurred as the result of a rotten hatchboard which looked alright from its upper surface, but broke and thus caused the accident.

The two eye witnesses called by respondent testified that they saw the accident, and fully corroborated petitioner's witnesses.

Respondent called two people who were not witnesses to the accident and who knew nothing about the physical condition of the hatchboard in question, and gave no testimony as to its condition.

The Court below sustained the trial court who did not make any finding of fact as to how the accident occurred, whose decision was based on his personal reaction that he did not like the demeanor of either the petitioner's nor respondent's witnesses to the accident.

It is respectfully submitted that it is of the utmost importance to all litigants that their claims be decided on the evidence and not on the mood of a trial court.

An Analysis f the Testimony

Frank Zalinski, witness or petitioner, testified that he was one of the hold men, anding in the starboard wing of the 'tween deck (38, 46, 0*). That at the time of the accident the fall was not in motion (42, 44, 45). That he heard a scream and saw pe tioner fall together with two pieces of a hatchcover (42, 5, 47). That he inspected the wood and the metal band eircling same, and saw that the "band was rusty and t e wood was rotten, warped" (47).

Stanley Kosek was also stationed in the 'tween deck at the time of the accident 53), and saw petitioner and a piece of a hatchboard fall d wn, followed by a larger portion of the board (53, 54). H testified that the wood looked "rotten" (57).

Henry Lecki, also statio ed on the starboard side of the 'tween deck, heard a scre m, and saw petitioner precipitated into the hold (58). hough he turned around too late to see the hatchboard fal he later saw two hatchboards missing from the middle s tion on the main deck (one in addition to the board ori inally removed for the fall), and that the fall had not be n in motion just prior to the accident (58, 59, 60).

Michael Zaluski, also st tioned on the starboard side of the 'tween deck, saw peti oner fall with two pieces of a hatchboard (61). He saw th pieces the following morning, which appeared "rotten" (62, 63).

Carmine Pignataro, peti ioner's first cousin, also stationed in the 'tween deck, t stified that the fall was stationary and that he doesn remember two pieces of a hatchboard falling with his ousin, as it was too dark for him and he was excited (63, 64).

References are to pages of appendix to appellant's brief in the Court below.

Sigmund Kosek, the hatch foreman, did not see the accident (65). He had handed the stationary fall to petitioner on the main deck, and had his back to the scene (66). That thereafter he went down into the hold and observed that the hatchboard was in two sections and that the larger section appeared rotten under the metal band with the screws sticking out (66, 67). The space left on the main deck hatch section by the broken board was thereafter made up by spacing the other boards (68).

In his statement, referred to in the opinion (100), Sigmund Kosek denied knowing what caused petitioner to fall, which he reaffirmed in his testimony. Nonetheless, the opinion assails petitioner's case on a purported contradiction of statements given by this witness who admittedly did not see the accident and whose statements were based on hearsay versions from others (100).

Sigmund Kosek was the sole witness for petitioner whose testimony was subject to cross-examination on purported contradictory statements made prior to trial.

Respondent's witness and employee, Cyril P. Radigan, did not see the accident, but made a log entry based on a statement of Charles Del Gatto, one of the winchmen.

Respondent's witness, Joseph Privi, the port winchman at the time of the accident, was stationed about twenty-five feet away from petitioner (71, 72). He testified that the fall had not moved and that petitioner fell down when the board on which he was standing broke (73). He had told the interviewer who took his statement that petitioner fell with the hatchboard, and that after the accident he saw the hatchboard missing (75, 79). In his statement dated January 9, 1950, he set forth that he did not know what caused the hatchboard to move and that he did not see it move (77, 78). His testimony at the trial explains that this didn't mean the hatchboard remained on the main deck while

petitioner fell into the hold, and the Court recognized that the language in the statement was not that of the witness (79).

Respondent's witness Charles Del Gatto was also a winchman, and saw petitioner go out on the hatchboard to relieve his foreman, while the winch was stopped, and testified that the board broke under petitioner and precipitated him into the hold (80, 81). A purportedly contradictory statement given by the witness to an interviewer on December 21, 1949 was admitted over objection and the Court then stated "I am going to now receive it in spite of the fact that he appears to be impeaching his own witness" (83, 84).

Del Gatto unequivocally denied the truth of certain portions of this improperly admitted statement and stated under oath that those contradictory portions were never read to him after he gave the statement (85, 86, 87). The challenge was never met by respondent who did not present the interviewer to the Court to contradict Del Gatto's testimony as to the errors in the statement.

Respondent's witness Prospero A. Petrosino, employed by respondent as security officer, testified as to the statements given by Sigmund Kosek, based on versions obtained from others (92, 93, 94). His testimony was in effect double hearsay.

Respondent's witness James M. Reid, employed as a watchman for respondent, who came aboard the vessel as petitioner was being removed, testified as follows:

> "Q. In those statements made to you did anybody tell you that the cause of the accident was that a hatch cover broke? A. Yes, sir" (96).

During the course of the testimony of the last "fact" witness, Prospero A. Petrosino, and after he had finished

testifying on respondent's theory as to the cause of the accident, the Court stated as follows:

> "The Court: You know what we are dealing with here—the question that you know very well. The condition of those hatch covers and what there was about the hatch covers which might have been responsible for what happened to the libellant in this case. I don't think the hooks have anything to do with it" (95).

By reason of the accident petitioner suffered a fractured skull and blood clot, with consequent removal of a large section of his skull, replaced with a metal plate, as well as fractures of his petrous bone and left patella, and other injuries (16) and was not mentally competent to testify in his own behalf as a result thereof.

Neither the master nor any other officer or member of the crew was called nor his absence explained by the respondent.

The trial was held on February 6, 7 and 8, 1950. The decision was not rendered until January 30, 1951.

POINT I

It is repugnant to the American concept of law to permit the mood of a Trial Court to constitute the basis of a decree in admiralty in total disregard of uncontradicted evidence and on the conceded testimony of respondent's witnesses that a rotten hatchboard broke and caused the accident.

The trial court made no finding as to how the accident occurred. His basis for a decree in favor of the respondent is not on any testimony whatsoever, but on the following grounds: (The following references are to the appendix of appellant's brief.)

1. That petitioner's witnesses had signed contradictory statements.

2. That petitioner's witnesses showed by their demeanor that they were eager to help petitioner's cause (fols. 302, 303).

3. That they were evasive.

4. That they agreed on several minute details.

5. That they contradicted each other.

Inadequate as is the basis advanced by the trial court for the decree, even such reasons are unsupported by the record.

1. As to contradictory statements, five of the six of petitioner's fact witnesses had made no statement contradictory or otherwise. The sixth, Sigmund Kosek, testified in accordance with his statement and testified that it was true (fol. 203).

2. As to eagerness to help petitioner's cause, it would be a dangerous precedent indeed to hold that a witness was incompetent to testify if he had a preference for one litigant's cause over the other's.

3. The charge of evasiveness is unfounded. Cross-examination was waived as to Henry Lecki (fol. 179). Carmine Pignataro, who was working in the 'tween deck was asked four questions in cross-examination, to which he gave direct short answers. Michael Zaluski was asked six questions in cross-examination to which he gave direct short answers. Stanley Kosek was likewise asked six questions in cross-examination to which he gave direct and short answers. Counsel for respondent-impleaded conducted a short examination which was in the nature of an explanation of some of the details of the work. Sigmund Kosek, who had signed a statement, was given a short examination, the substance of which cross-examination demonstrated that what he had testified to at the trial and what he said in the statement was substantially the same and a true version of what had taken place. Frank Zalinski

was put through an extremely short examination and gave short and direct answers to all the questions.

A reading of the record will disclose no basis for the charge of evasiveness.

4. The fact that witnesses agreed with each other needs no argument. To hold that agreement by witnesses for a claimant is the basis for a degree against him has no support in law or fact.

5. The charge that witnesses contradicted each other seems strange in the face of the trial court's decision that they agreed with each other in many minute details. The record will not disclose one single contradictory fact of any substance.

The fact that one witness failed to see both pieces of the hatchboard come down and only saw one of them, while others saw both pieces, is the only evidence which might be considered at variance between the witnesses.

POINT II

The Court below erred in sustaining the Trial Court's decision which was based on collateral issues and not on the evidence.

Respondent called Joseph Privi and Charles Del Gatto for the sole purpose of impeaching their credibility by prior written statements. Actually, respondent failed to impeach their credibility. However, permitting such witnesses to testify over objection constitutes error.

Calling a witness for the sole purpose of impeaching him or offering in evidence a statement which could not otherwise be received in evidence, constitutes error.

A party cannot introduce ex parte statements of its own witness, by calling an unwilling witness to the stand. *Kuhn* v. *U. S.*, 24 F. 2d 910, rehearing denied and reversed in part, 26 F. (2d) 463 c. d., 49 S. Ct. 11, 278 U. S. 605, 73 L. Ed. 533.

Statements made by a litigant's witnesses before trial, inconsistent with their testimony at trial, are admissible for purpose of impeachment only on showing that litigant had been entrapped by such statements and ought not to be bound by their testimony. *New York Life Ins. Co.* v. *Bacalis*, 94 F. (2d) 200.

A party cannot call a witness for the sole purpose of impeaching him by inconsistent statements. *Fong Lum Kwai* v. *U. S.*, 49 F. (2d) 19.

A statement which seems to contradict a witness may be used for impeaching said witness, but not as original evidence. *D'Allessandro* v. *Bechtol*, 104 F. (2d) 845.

Petitioner was not required to negative the existence of remote possibilities that the injury was not caused by the respondent or that respondent was not negligent. *Betzag* v. *Gulf Oil Corp.*, 298 N. Y. 358, 364-365.

The opinion of the Court below fails to consider the count for unseaworthiness. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. On a similar issue before said Court, where a complaint of a longshoreman was dismissed because the evidence would not support the count for negligence, the judgment of the trial court was reversed on the ground that "the same considerations do not, however, dispose of the count for unseaworthiness". *Cannella* v. *Lykes Brothers S.S. Co.*, 174 F. (2d) 794.

Libelant contended and proved that a certain hatchboard broke while in a rotten and defective condition, thereby causing him to be precipitated down into a hold. Not one witness present at the time contradicted petitioner's contention.

In the case of *Erie R. Co.* v. *Murphy,* 9 F. (2d) 525, before Hough, Manton, and Hand, Circuit Judges, the Court said on page 526 as follows:

> "[3] An inference is not legally the same thing as a presumption, though both may connote a reasoning process, for a presumption may measurably take the place of proof, while the inference we have stated 'does not relieve from the burden of proof but does put the burden of evidence—i.e., of explanation—on' (in this case) the defendant below. Kraljer v. Snare, 221 F. 255, 137 C. C. A. 108."

An inference can never be based on an inference, so well expressed by Commissioner of Appeals Clay in *Sutton's Adm'r* v. *Louisville & N. R. Co.,* 168 Ky. 81, 181 S. W. 938, 940 cited with approval at page 352 in the case of *Hackworth* v. *Chesapeake & O. Ry. Co.,* 73 F. Supp. 348, in the following language:

> "Following this rule, it is held that conjecture affords no sound basis for a verdict. It is not sufficient, therefore, to present a number of circumstances about which one might theorize as to the cause of the accident. Where it is sought to base an inference on a certain alleged fact, the fact, itself must be clearly established, if the existence of such a fact depend on a prior inference, no subsequent inference can legitimately be based upon it."

See also:

Gulotta v. *United States,* 113 F. (2d) 683.

The evidence was so overwhelmingly on the side of the petitioner as to leave no reason to doubt the fact that the accident happened as testified to by all of the eye witnesses.

Nothing in the record will show any testimony as to any material fact which is conflicting, vague or uncertain as to the cause and manner of the happening of the accident.

There is nothing in the record to sustain a decree in favor of the respondent, either on the facts or on the law.

The trial court disregarded the unimpeached and credible testimony of six witnesses to all of whose testimony cross-examination was substantially waived by respondent, and commented on the testimony of Sigmund Kosek.

Instead of relying upon testimony the Court accepted statements of respondent's professional investigator Petrosino as an experienced hand on testifying, that Sigmund Kosek had given conflicting oral versions to him of the accident as proof that Kosek was unworthy of belief because he did not see the accident. Petrosino's experience in testifying appears from the following (fol. 142): Appellee's Brief.

> "Q. How many times have you testified in Court during your lifetime? A. Numerous times.
> Q. Does that mean a thousand? A. Probably."

This, in the face of the uncontradicted fact that Kosek was at the scene as foreman in charge of the work seems unjustified. In any event, the contradictory statement by Kosek made outside of the Court could only go to the weight of the evidence and such oral contradictory statements could not be used as the basis to substitute for evidence.

A decree which lacks any support in the record is clearly erroneous.

The Court below, in the case of *Barbarino* v. *Stanhope S.S. Co.*, 151 F. (2d) 553, 555, speaking of the trial Court's findings, did not require that said Court defer to the decision of the lower Court even where the findings of fact were not clearly erroneous, saying as follows:

> "* * * his finding, like that upon the first, would not have been a 'finding of fact' which we must accept unless 'clearly erroneous'. It is true that in a jury trial the standard of care demanded in any given situation is regarded as a question of fact, and the verdict is as conclusive upon it as it is upon any other question; for a jury is deemed—rightly or wrongly—to be as well qualified to set such a standard as a judge. But when the decision is that of a judge, we distinguish between such findings and true findings of fact; and the conclusion is as freely reviewable as any 'conclusion of law', strictly so called. The C. W. Patterson, 2 Cir., 70 F. 2d 712; Ford Motor Co. v. Manhattan Lighterage Corporation, 2 Cir., 97 F. 2d 577; The Ira S. Bushey, Inc., 2 Cir., 120 F. 2d 1010. That this is right appears, when we consider that to fix any standard of care two conflicting interests must be always appraised and balanced, that of the person to be protected, and that of the person whose activity must be curtailed. It is true that the interest of the person to be protected must also be discounted by the improbability that it will be invaded, and that that involves only a question of fact; nevertheless, in the end no decision can be reached except by choosing between two human interests, one of which must be sacrificed. Such choices are the very stuff of law, and as to them appellate courts have no reason to defer to the decisions of courts of first instance."

If ever a situation called for a trial de novo in admiralty the case at bar is it.

In the case of *Travelers' Indemnity Co.* v. *Parkersburg Iron & S. Co.*, 70 F. (2d) 63, the Court stated on pages 64, 65:

> "The rule is well settled, of course, that evidence contrary to established physical facts has no probative value. U. S. v. Diehl (C. C. A. 4th), 62 F. (2d) 343; Atlantic Coast Line R. Co. v. McLeod (C. C. A. 4th), 11 F. (2d) 22. But to justify the ignoring of evidence under this rule the evidence ignored must be utterly at variance with well-established and universally recognized physical laws and therefore inherently impossible. See Wasiota & B. M. R. Co. v. Hall, 167 Ky. 819, 181 S. W. 629; Wolf v. City R. Co., 50 Or. 64, 85 P. 620, 91 P. 460, 15 Ann. Cas. 1181."

The mood of a trial court is hardly justification for ignoring uncontradicted and conceded evidence.

In the case of *Mutual Life Ins. Co. of New York* v. *Sargent*, 51 F. (2d) 4, the Court stated on page 6:

> "[7] It is true enough that the rule though not universal, is well established in the federal courts, and in some state courts, that the uncontradicted testimony of a witness not impeached or discredited in any way, to a plain and simple fact capable of contradiction if untrue, does not raise an issue of fact to be submitted to a jury."

The trial court completely disregarded this well established rule of the federal courts.

In the case of *Alabama Title & Trust Co.* v. *Millsap*, 71 F. (2d) 518, the Court stated on page 520:

> "The rule is well settled that the uncontradicted testimony of a witness, not incredible in itself, nor

> impeached nor discredited in any way, to plain and simple facts capable of contradiction, ordinarily must be accepted as true by a jury."

The trial court refused to accept the uncontradicted testimony of six witnesses, not incredible in itself, nor impeached nor discredited in any way, as to plain and simple facts capable of contradiction, and which he should have accepted when sitting in the capacity of a trier of facts.

In the case of *Gibson* v. *Southern Pac. Co.*, 67 F. (2d) 758, c. d. 54 S. Ct. 458, 291 U. S. 673, 78 L. Ed. 1062, the Court stated on page 762:

> "[3] Appellant concedes that in the federal court, and in many of the state courts, the general rule is that the uncontradicted testimony of a witness not incredible in itself, nor impeached nor discredited in any way, to plain and simple facts capable of contradiction ordinarily must be accepted as true by the jury."

It might be fair to assume that one witness discredits himself by his attitude, but when you have six witnesses for the petitioner and two for the respondent, and apparently the master and all the officers and crew are available as a source of contradiction and not called nor their absence explained, that under such circumstances the mere reaction of the trial court should not suffice as the basis of a decree in total disregard of the evidence.

In the case of *Ariasi* v. *Orient Ins. Co.*, 50 F. (2d) 548, the Court stated on page 551:

> "Although it is a fundamental rule of law that a trial court is not required to accept the testimony of any witness as true, but must weigh the testimony of such witness in connection with all the other evidence in the case and determine the truth, in the

absence of all contradictory evidence and any inherent improbability in the testimony, the court cannot arbitrarily reject the testimony of a witness whose testimony appears credible."

The record clearly demonstrates that the trial court arbitrarily rejected the testimony of all the petitioner's and respondent's witnesses to the accident.

The positive evidence on the part of petitioner's witnesses is entitled under the law to greater weight than negative evidence urged by respondent. See:

The Buenos Aires, 5 F. (2d) 425;
The Windrush, 286 F. 251;
Lancashire Shipping Co. v. *Morse Dry Dock & Repair Co.*, 48 F. (2d) 1077, affirming, D. C. 43 F. (2d) 750, c. d. 284 U. S. 642;
The Fort St. George, 22 F. (2d) 195, affirmed, C. C. A. 1928, 27 F. (2d) 788, c. d. 1929, *Bermuda & West Indies S.S. Co.* v. *Oceanic Steam Nav. Co.*, 278 U. S. 654.

There was an abundance of positive and uncontradicted evidence on the part of the petitioner. There was no negative evidence on the part of the respondent (the lower Court's statement that there was, is not supported in the record).

POINT III

A decree unsupported by any evidence and contrary to the uncontradicted and conceded testimony of petitioner's witnesses, constitutes error.

The law is well settled that our Courts must base their decisions on evidence adduced in the courtroom and to hold that a decree unsupported by any evidence is unassailable on appeal, constitutes error, as is the affirmance which is predicated on the same basis.

The respondent failed to sustain its burden of proof that the hatchboard was in fact seaworthy or that the unseaworthy condition was not the proximate cause of the accident.

Respondent presented no proof to contradict the fact that the hatchboard on which petitioner had been standing fell down into the hold. In fact, one of respondent's speculative theories is that a hook from the ascending fall caught the underside of the hatchboard to cause it to go down with petitioner.

This latter theory was entirely discounted by the Court in the course of the trial and no credence in it is expressed in the opinion.

The opinion does read, however, as if the burden of proof devolved upon petitioner. This petitioner's burden goes no further than proof of an unseaworthy condition, clearly established by the petitioner herein, which respondent has failed to meet or controvert.

In the case of *American Co. for International Commerce* v. *United States*, 26 F. (2d) 468, Judge Winslow stated as follows on page 469:

> "The burden of proof is upon the shipowner to show due diligence in making a ship seaworthy."

In the case of *Nelson* v. *Robin Line Steamship Co., Inc.*, 39 F. (2d) 430, 432, where a defective winch was involved in an accident, though the exact cause of the accident was unknown, the Court held as follows:

> "However the evidence does clearly establish that the injury resulted from the use of a winch known to be defective, and, in the absence of positive testimony that the injury was wholly caused by some other and undisclosed defect, such as a defective bolt which could not have been discovered by the ship-

owners by reasonable diligence, the preponderance of the whole evidence sustains the allegation that the shipowner was negligent in furnishing such a winch for the use of the stevedores."

This has been further extended by the *Sieracki case, supra*, to include a warranty of seaworthiness for even latent defects.

The principle of law expressed in the *Nelson case, supra*, finds its basis in the Admiralty rule that where a vessel has committed a breach of duty, she must show not only that her fault did not cause the accident, but that her fault or neglect could not have caused the accident.

See:

Olds v. *McKercher*, 72 F. Supp. 256;
The City of New York, 147 U. S. 72;
Belden v. *Chase*, 150 U. S. 674;
U. S. F. & G. v. *U. S.*, 152 F. (2d) 46.

Respondent failed to controvert the essential elements in petitioner's case. In fact, two of respondent's witnesses, Privi and Del Gatto, supported petitioner's cause.

The record is completely barren of a single fact to support the decree of the trial court.

Only one of petitioner's witnesses, the hatch-boss Sigmund Kosek, gave what the trial court deemed to be contradictory statements. Yet the statements support the testimony of this witness that he did not see the accident and whatever conclusions he may have expressed were no more than hearsay.

To conclude from all this, as did the trial court, that this made the "collective testimony much too weak, inconclusive and uncertain to support a verdict in favor of petitioner" is clearly erroneous.

POINT IV

The trial court erroneously drew an inference that both petitioner's and respondent's witnesses were interested in petitioner's cause and from said inference drew the inference that they were not telling the truth, and from the inference that all the fact witnesses were not telling the truth a further inference was drawn that the hatch board did not break, although there was no explanation by any ship's officer or employee or any one else as to how the respondent claimed the accident did occur.

There is not a single fact set forth in the opinion of the trial court from which he drew any of his inferences. Without the existence of a fact no inference can be drawn.

See prior citations on page 16 of this brief.

CONCLUSION

When we consider the fact that the Presiding Circuit Judge was Augustus N. Hand in the Court below, a most brilliant, experienced and fair-minded jurist, and then read the opinion which erroneously states that Radigan and Petrosino gave testimony which in fact they did not, it would appear that after reading the record the Court below evidently retained the impression, what was said by counsel for respondent at the argument was actually contained within the record and thereby the Court was misled into error.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JACOB RASSNER,
on Petition.

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Office - Supreme Court, U. S.
FILED
AUG 9 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 180

JOSEPH PIGNATARO,

Petitioner,

against

WATERMAN STEAMSHIP CORPORATION,

Respondent,

and

RYAN STEVEDORING CO., INC.,

Respondent-Impleaded.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR WATERMAN STEAMSHIP CORPORATION IN OPPOSITION

EDWARD J. BEHRENS,
CHARLES H. LAWSON,
Proctors for Respondent.